

**THE HIGH COURT**

[2020] IEHC 608

[Record No. 2012/463 MCA.]

**IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000 AS  
AMENDED**

**AND**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**JENNIFER FOWLER**

**APPLICANT**

**AND**

**KEEGAN QUARRIES LIMITED**

**RESPONDENT**

**JUDGMENT of Mr. Justice Michael White delivered on 24th of November, 2020**

1. This judgment follows on from that delivered by the court on the 28th October, 2016 on a development contrary to planning permission at a quarry in Clegarrow near Rathmoylan, County Meath.
2. As a result of the original judgment, the court decided to appoint an expert to assist in its determination of outstanding issues of remediation of the lands and also concerns that the illegal development could impact on adjoining lands or a Special Area of Conservation. The parties are familiar with subsequent court hearings, correspondence and reports.
3. The Court heard submissions on the 22nd and 25th November, 2016; 11th January, 2nd February, 9th February, 29th March and 13th October, 2017; 5th September, 2018; 9th October, 2019; and 24th January, 2020. A substantive hearing occurred on the 15th October, 2020 when the court reserved judgment. There were a number of brief mention dates. Those occurred on the 28th February and 28th July, 2017; 12th April, 2018; and the 14th January and 29th July, 2020.
4. The relevant interim court orders are the 25th November, 2016, appointing the expert and setting out the expert's tasks, a further order of the 13th October, 2017, directing the expert to carry out certain testing. The relevant letters from the court to RSK, the court appointed expert, are the 22nd February 2017, 17th April, 2018 and 24th October, 2018.
5. The court received its first report from RSK on 21st July, 2017 which was an Initial Site review and Summary Report. On the 13th October 2017. Mr. Peter Rodgers of RSK gave evidence and was cross-examined. The court gave further directions to Mr. Rodgers on that date.
6. The court received a second report from RSK on 13th March, 2018, an Assessment of Environmental and Ground Conditions and copies of all tests and monitoring carried out.
7. Some issues arose about further costs of RSK which had to be clarified by the court. At a court hearing on the 5th September, 2018 directions were given to RSK on fees and outstanding work to be completed.

8. The court received the RSK final report on 7th June, 2019, an Assessment of Silt Beds and Feasibility of Pumping Lakes 1 and 2.
9. The matter was listed on 9th October, 2019 when directions were given and the case listed for hearing on 24th January, 2020.
10. On 24th January, 2020, the matter was not ready to proceed. The court fixed a new court hearing date of 19th June, 2020 to finalise all issues. Due to an ongoing criminal trial, the court was not able to take up the matter on the 19th June, 2020 and a new date was fixed for the 15th October, 2020 when the matter proceeded.
11. The relevant reports and documentation considered are the Environmental Impact Statement of February 2002 prepared by John Barnett & Associates Ltd, three reports of RSK of 21st July, 2017, the 13th March, 2018 and the 7th June, 2019; the Landscape Restoration Method Statement from Mullin Design Associates on behalf of the Respondent of the 19th December, 2019 and a report of 2nd July, 2020, from Fehily Timoney titled Landscape Reinstatement Design Scope of Work Requirements prepared on behalf of the Applicant and a Scott schedule.
12. Arising from the reports and submissions, there are two issues of substance which the court will deal with as a matter of principle before proceeding to the detail of the remediation plan.

**The Potential Impact on a Special Area of Conservation (SAC) and the European Law obligations of the Court**

13. The court received written legal submissions on the 1st October, 2020 prepared by Mr. Fitzsimons SC and Mr. Shanley BL, on behalf of the Applicant, and these were expanded by way of submissions at the hearing of the 15th October, 2020.
14. The court's attention was drawn to the European Union Directive 2014/52/EU of the European Parliament and the Council of the 16th April, 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. Particular attention was drawn to para. 38 of the declaration:-

*"Member States should lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. Member States should be free to decide the kind or form of those penalties. The penalties thus provided for should be effective, proportionate and dissuasive."*

The court's attention was also drawn to Article 10A which is in similar terms to the declaration.

15. The Applicant also reminded the court of its responsibilities pursuant to Article 6(3) of Council Directive 92/43/EEC given effect in this jurisdiction by Statutory Instrument No. 94 of 1997 European Communities (Natural Habitats) Regulations, 1997. The Applicant submitted while there was not a request for a Statutory Environmental Impact Assessment or Statutory Appropriate Assessment that it was appropriate there would be

some further level of assessment both in relation to screening for Environmental Impact Assessment and screening for Appropriate Assessment. Mr. Fitzsimons SC, on behalf of the Applicant, submitted that the principles of sincere cooperation require emanation from the State including the courts to have the obligation to take all measures necessary within their respective spheres of competence to remedy the failure to have carried out an Environmental Impact Assessment on the illegal development, that there had been a fundamental breach of the original planning permission and a breach of the obligations under the EIA Directive to carry out a prior assessment of the extended and unauthorised development. It occurred without any assessment of the likely significant effects that clearly stood in breach of the EIA Directive in addition to standing in breach of the Planning and Development Acts.

16. The Applicant argued that it was not clear the extent to which, if at all, the RSK reports provide sufficient information which would permit the court to carry out a form of appropriate assessment screening exercise which the court itself has indicated that it is obliged to conduct.
17. The Respondent in reply submits that the court dealt with this matter in its judgment of the 28th October, 2016. A remit of the expert appointed by the court was to carry out a screening assessment which RSK completed and issued a report of the 13th March, 2018 backed up by testing ordered by the court on 13th October, 2017, and thus there is no requirement for any other form of assessment.
18. Both parties agree that the appropriate test is that set out in the judgment of Barniville J. of the 8th February, 2019, *Kelly v. An Bord Pleanála* [2019] IEHC 84. At para. 68 of the judgment, the court sets out herein the relevant paragraph:-

*"It seems to me that for present purposes, the following principles applicable to the screening stage for appropriate assessment (stage 1 screening) can be derived from Article 6(3) of the Habitats Directive, as interpreted and applied by the CJEU, and from s. 177U of the 2000 Act, as interpreted and applied by the Irish courts:*

- (1) *The threshold test in Article 6(3) of the Habitats Directive and s. 177U (1) of the 2000 Act is that an appropriate assessment will be required if the proposed development is "likely to have a significant effect" on the protected site (i.e. a "European site" under part XAB of the 2000 Act), either individually or in combination with other plans or protects. That this is the threshold test is clear from the decision of the High Court (Finlay Geoghegan J.) in Kelly (at para. 40), as approved by the Supreme Court in Connelly (at para. 8.14).*
- (2) *It is not necessary, in order to trigger the requirement to proceed to stage 2 appropriate assessment, that the proposed development will "definitely" have significant effects on the protected site but such a requirement will arise if it is a "mere probability" that such an effect exists (Waddenzee, para. 41). This was developed by the CJEU in Waddenzee (at para. 43) where the court*

*stated that the requirement to carry out an appropriate assessment will be satisfied if there is a "probability or a risk" that the development will have "significant effects" on the protected site.*

- (3) In light of the precautionary principle, such a "risk" will be found to exist if "it cannot be excluded on the basis of objective information" that the particular development "will have significant effects" on the protected site (Waddenzee, para. 44)(see also People over Wind, para. 34).*
- (4) Under s. 177U(4) of the 2000 Act an appropriate assessment will be required if, on the basis of objective information, a "significant effect" on a European site "cannot be excluded".*
- (5) Under s. 177U(5), an appropriate assessment will not be required if, on the basis of objective information, a "significant effect" on a European site "can be excluded".*
- (6) In the case of "doubt as to the absence of significant effects" an appropriate assessment must be carried out (Waddenzee, para. 44). The requirement to conduct an appropriate assessment will arise where, at the screening stage, it is ascertained that the particular development is "capable of having any effect" (albeit this must be any "significant effect") on the European site (para. 46 of the opinion of Advocate General Sharpston in Sweetman).*
- (7) The "possibility" of there being a "significant effect" on the European site will give rise to a requirement to carry out an appropriate assessment for the purposes of Article 6(3). There is no need to "establish" such an effect and it is merely necessary to determine that there "may be" such an effect (para. 47 of opinion of Advocate General Sharpston in Sweetman).*
- (8) In order to meet the threshold of likelihood of significant effect, the word "likely" in Article 6(3) and s. 177U(1) should be read as being less than the balance of probabilities. The test does not require any "hard and fast evidence that such a significant effect was likely". It merely has to be shown that there is a "possibility" that this significant effect is likely (per Haughton J in Alen-Buckley, para. 83).*
- (9) The assessment of whether there is a risk of "significant effect" on the European site must be made in light, inter alia, of the "characteristics and specific environmental conditions of the site concerned" by the relevant plan or project (see, most recently, People Over Wind, para. 34).*
- (10) Plans or projects or applications for developments which have "no appreciable effect" on the protected site are excluded from the requirement to proceed to appropriate assessment. If all applications for permission for proposed developments capable of having "any effect whatsoever "on the protected*

*site were to be caught by Article 6(3) (or s.177U) "activities on or near the site would risk being impossible by reason of legislative overkill" (Opinion of Advocate General Sharpston in Sweetman, para. 48).*

*(11) While the threshold at the screening stage of Article 6(3) and s. 177U is "very low" (Opinion of Advocate General Sharpston in Sweetman, para. 49; judgment of Finlay Geoghegan J. in Kelly, para. 30), nonetheless it is a threshold which must be met before it is necessary to proceed to the stage 2 appropriate assessment stage."*

This court dealt with the matter in its judgment of the 28th October, 2016 at paras. 85 and 144 of its judgment.

19. The court in the schedule to its order of the 25th November, 2016 at para. 3 stated *"the expert will carry out screening for an appropriate assessment"*. At para. 6, of the schedule *"the expert will assess the potential impact on ground water, surface water flora and fauna"*.
20. At the court hearing on the 13th October, 2017, the court engaged with the expert on the initial site review and summary report of the 21st July, 2017. Both the Applicant and the Respondent had the opportunity to cross-examine Mr. Rodgers on that date.
21. The court in its order of the 13th October, 2017 stated at para. 2 *"installation of 10 to 12 bore holes to enable the ground water to be tested to enable the court to decide if there is contaminant water into the water courses to deal with the issues relating to the Habitats Directive and any issues in relation to the filling in of the two large lakes and that RSK do provide an updated report in writing on their findings to the court by the 12th January, 2018 and to furnish copies of the report to the solicitors for each of the parties"*.
22. The report was received on the 13th March, 2018 together with the detailed tests carried out.
23. The expert came to specific conclusions and the relevant extracts are:-

### **"2.3 HYDROLOGY**

*There is an unnamed stream adjacent to the Western boundary of the site. The unnamed stream flows in a northerly direction, joining with a larger stream/river at a point 415m to the north of the site (known as the Formal River). The Formal River converges with the Tromman River 3.35km to the north west of the site, eventually entering the River Boyne at a point approximately 6.75km to the north west of the site.*

*According to information hosted on the Environmental Protection Agency's (EPA) map viewer the network of streams surrounding the site are part of the Tromman Stream river sub-basin within the Boyne catchment and are subject to assessment under the local River basin Management Plan (RBMP) as a designated river waterbody. The streams have an overall status of "good"*

*(RBMP 2009-2015) and an overall objective of "protect". The River Boyne also has an overall "good" status. The site lies within the Lower Boyne (surface) water management unit within the Eastern River Basin District.*

## **5. GENERIC QUANTITATIVE RISK ASSESSMENT.**

*In the absence of specific guidelines in the Republic of Ireland, the results of soil groundwater and surface water analysis have been compared to generic assessment criteria (GAC) derived by RSK assuming a public open space end use for the site.*

*The GACs have been derived in accordance with industry recognised best practice standards, the Model Procedures for the Management of Land Contamination (CLR 11). These procedures have been developed to provide the technical framework for applying a risk management process when dealing with land affected by contamination.*

*Screening the results of laboratory analysis against the GACs allows for the completion of a Generic Quantitative Risk Assessment (GQRA). The GQRA will identify if any unacceptable risks are present which may adversely impact human health or the environment.*

### **5.2 Controlled Waters**

*The groundwater and surface water results have been compared to the GAC derived by RSK for the protection of controlled waters. The screening values for groundwater results in the context of protection of controlled waters and their derivation are included in Appendix D.*

*The exceedances of GAC values in groundwater samples are as follows:*

- . aromatic hydrocarbons (C12-C16) in BH4 with a concentration of 249 ug/l, compared to a GAC value of 90 ug/l*
- . aromatic hydrocarbons (C16-C21) in BH4 with a concentration of 97 ug/l, compared to a GAC value of 90 ug/l*
- . concentrations of copper in BH6 (1.81 ug/l) and BH8 (2.48 ug/l) compared to a GAC value of 1.0 ug/l*
- . nickel in BH1 (5.73 ug/l), BH4 (12.1 ug/l), BH5 (4.53 ug/l), BH6 (8.55 ug/l) and BH8 (9.81 ug/l) compared to a GAC value of 4.0 ug/l*

*The results of laboratory analysis reported concentrations of parameters for all surface water samples below the respective GAC values.*

*The elevated concentrations of aromatic hydrocarbons reported in BH4 appear to be localised and are likely associated with the storage of fuel and oil in the immediate surrounding area. Concentrations of hydrocarbons for the remaining groundwater and surface water samples were below the GAC value.*

*The elevated concentrations of nickel and copper reported across the site are marginal and relatively low level. It is considered likely that these concentrations are representative of local groundwater conditions and have not been impacted by quarrying activities. Surface water sample for the on-site lakes and the unnamed stream bordering the western boundary of the site did not report any elevated concentrations of metals. Laboratory results for surface water samples did not report elevated concentrations of nickel or copper.*

*The results of groundwater gauging (see Table 4-1) indicate that there is a gentle hydraulic gradient across the site with groundwater movement in a northerly direction.*

*It is considered unlikely that quarrying operations have significantly impacted the groundwater or surface water quality at the site. There does not appear to be a significant risk to the nearby Boyne catchment area."*

24. This report met the standards of a screening assessment for an appropriate assessment in respect of the Habitats Directive. If the expert has concluded that no contaminants are leeching from the site of the quarry lands into water courses and flowing out of the quarried lands, there is no need to carry out any wider assessment of the Special Area of Conservation. Applying the test as laid down by Barniville J., this Court is satisfied on the balance of probabilities that no risk arises to adjoining land owners or to the Special Area of Conservation of the River Boyne from the unauthorised development. There is no requirement to carry out any further screening reports.

#### **The Filling in of Lakes 1 and 2**

25. This was dealt with in the final report from RSK of the 7th June, 2019.

I refer to the relevant extracts:-

#### **"3.1 Trial Pits**

*Two trial pits were excavated on 12th March using an eight-tonne excavator. The trial pits were located immediately west of each of the two lakes (Lakes 1 and 2) and were excavated to an approximate depth of 2m below standing water level in the lakes (just over 2m bgl). The trial pit beside Lake 2 (to the north of the site) was excavated adjacent to a monitoring borehole (BH02) installed during the earlier phase of site investigation work completed by RSK. There were no monitoring wells close to Lake 1, so the test pit was excavated in an open accessible area close to the lake and groundwater observations were carried out directly from the pit.*

*Descriptions of the ground and ground water conditions encountered are presented in the trial pit records in Appendix C.*

#### **3.4 Pumping Tests**

*Pumping tests were carried out at the two trial pits excavated on 12th March 2019, adjacent/immediately west of each of the two lakes (Lakes 1 and 2). The test pits*

were dug to act as sumps to allow pumping operations, which due to their close proximity are considered to be representative of pumping directly from each of the two lakes. For the northern test (Lake 2) a closely spaced monitoring well (BH02) was used to accurately measure water level drawdown as pumping from the trial pit progressed and recharge on cessation of pumping. For the test at Lake 1 there was no suitable monitoring well, so periodic observations of groundwater levels were made directly from the trial pit.

A Koshin PB-55022 pump with a maximum delivery volume of 290 litres per minute, was employed for pumping down/dewatering the trial pits, with the discharge being pumped down gradient away from the monitoring well or test area.

It is considered unsafe practice to continuously measure the water level in a trial pit as the edges of the trial pit may be unstable and at risk of collapse. In the case of the trial pit representative of Lake 2, the drawdown of groundwater was gauged by measuring the water level in an adjacent borehole (BH02) with a dip meter. A visual assessment was made in the case of dewatering of the trial pit representative of Lake 1.

Each pumping test lasted over two hours, with approximately 70 minutes of pumping and approximately 60 minutes of groundwater recharge. While pumping the Lake 2 trial pit, water levels in BH02 were measured immediately before pumping commenced (zero seconds), then at 30 seconds, one minute, two minutes, five minutes, ten minutes and continued five-minute intervals until water level stabilised. Pumping operations were then terminated and the groundwater recharge was measured at five minutes, ten minutes and continued five-minute intervals until water level stabilised.

### **5.3 Summary of Findings**

There are two key findings from the additional phase of site assessment works.

The first is that it will be very difficult to dewater the lakes to allow them to be subject to infilling by placement of engineered fill. The pump tests indicate that the standard approach to dewatering, by pumping from pits or sumps, is unlikely to be effective given the continuity of groundwater and highly permeable nature of the underlying natural sand and gravel deposits. Other methods of dewatering could be considered, such as extensive well-pointing or ground freezing but these methods would be prohibitively expensive and might not in any case be guaranteed success.

### **6.4 Opinion of the feasibility of infilling Lakes 1 and 2**

The pumping test carried out as part of the current site assessment has confirmed that it will be difficult to dewater the lakes to allow them to be subject to infilling by placement of engineered fill. The standard approach to dewatering, by pumping from pits or sumps, will be ineffective given the continuity of groundwater and highly permeable nature of the underlying natural sand and gravel deposits.



*There are alternative methods of water drawdown, including for example extensive well-pointing or ground freezing, however these methods would be prohibitively expensive and would require extensive drilling works to be carried out around the complete perimeter of the lakes and surrounding areas. For Lakes 1 and 2 this would require access onto surrounding land parcels outside the boundary of the existing quarry site. In addition, any such works would require very high volumes of water to be pumped out, which could not be easily accommodated into existing surface water courses (without affecting their flow rate and quality) and such high discharge rates could result in significant down-stream erosion, turbidity and disturbance.*

*On the basis that it is not feasible to dewater Lakes 1 and 2 the only option to infill them would be by using fill materials suitable for use beneath standing water. This is an unusual requirement for earthworks, however it is covered briefly in the SHW guidance. The class of material for this end use is Class 6A (these are selected well graded granular material – including natural gravel or sand or crushed rock/concrete).*

*Such materials are present on site where natural sand and gravel deposits remain undisturbed in situ and in very limited quantities within small stockpiles within the northern quarry area. In the operational areas slabs and building are present, which will have to be removed as part of the site restoration works and these materials when broken to the appropriate size could also be used as Class 6A fill. The quarrying works on site are likely to have removed all the easily accessible natural sand and gravel deposits, consequently the only remaining possible Class 6A materials are the very limited quantities in the existing small stockpiles and from clearance works. A volume calculation exercise should be completed to see what volumes are available but at this stage it only looks practical to consider infilling the smaller shallower lakes. The significant depths and sizes of the 2 large lakes make infilling impractical unless clean inert granular soils are brought into the site for this purpose.”*

26. The parties agreed the relevant valuation of the acreage of the lands in lakes 1 and 2 at €11,000 per acre. The court accepts there was no cost benefit analysis carried out by RSK. Having given a definitive opinion that the dewatering of lakes 1 and 2 was not a feasible operation, there was no need to proceed to a cost benefit analysis.

27. Section 160(1)(b) of the Planning Act 2000 as amended states:-

*“Insofar as is practicable that any land is restored to its condition prior to the commencement of any unauthorised development”*

28. It is not practicable, and definitely not feasible to fill in lakes 1 and 2 and, thus the remediation plan has to incorporate lakes 1 and 2 *in situ*. The Respondent has a responsibility as a result of the court’s decision to address the issue of the steep slopes

which surround lakes 1 and 2. These have to be eliminated as far as practicably possible and any danger or risk either eliminated or reduced to the minimum possible.

29. In the areas where lakes 1 and 2 come close to the boundaries of the licence agreement, the court cannot dictate to the Applicant to concede any land to bring the slopes into conformity with the original Environmental Impact Statement. The court must address the remediation plan within the context of the boundaries of the licence agreement and the extended area of the lands where the quarrying took place.
30. It is essential that a slope survey takes place to quantify the slopes that need attention. It may be difficult to address the issue of steep slopes that are under water, but if there are areas of lakes 1 and 2 left where there is no possibility other than to leave in situ steep slopes, those must be protected by fencing and warning signs at the expense of the Respondent.

#### **Remediation Plan and Method Statement**

31. In remediation the Respondent should follow the EIS of February 2002, except where the court has permitted deviation. It should then follow the recommendations in the RSK reports. The method statement should reflect that.
32. There are four substantial mounds of soil located on the lands, together with other smaller mounds of sand and gravel.
33. The court has already dealt with this issue in its judgment at paras. 132, 133 and 145.
34. The court is sceptical that there is enough topsoil existing on the lands, the subject of the licence agreement and the extended lands, to allow for the remediation programme. Mr. Mullin is of the opinion that there are portions of material in the four large mounds that could be separated and treated and used as topsoil. That is disputed by the Applicant.
35. RSK has suggested that certain further tests need to be carried out in respect of these mounds and those should be completed. There will have to be an attempt to separate and sort out the material in these mounds to establish exactly what is suitable for infill for lakes 3 and 4, what is suitable for subsoil and if any of it is suitable for topsoil. The court cannot micromanage this issue and common sense should prevail. The volume of the material available on site will have to be accurately assessed.
36. The Landscape Restoration Method Statement prepared by Mullin Design Associates of the 19th December, 2019, the Report of Fehily Timoney of the 2nd July, 2020 and the Scott schedule are very helpful to the court. In respect of the suggestion in Fehily Timoney's report that there would be another layer of consultants introduced to come up with a design for the remediation, the court is not in favour of that. There is more than sufficient information from the experts in the hands now of the Applicant and the Respondent and before the court to develop a detailed method statement for this work to commence and be completed.

37. The Respondent, because of its expertise, may wish to carry this work out itself rather than use a subcontractor. The court has not been appraised of that position.
38. It is important that as detailed a method statement should be finalised and that the court incorporates it as part of its final order.
39. Not every issue can be dealt with in the method statement, ongoing issues will have to be dealt with by the parties. It is appropriate to appoint an appropriate independent supervisor whose fees should be discharged by the Respondent.
40. The court has already set out at para 134 of its original judgment the matters upon which the parties are broadly agreed. The Scott schedule has updated that and notes there is substantial agreement on a number of matters.
41. The court does not intend to tease out any other matters but will clarify any issue and resolve disputed issues once a detailed draft method statement is produced to the court for final approval. A timescale for the work needs to be presented to the court. The preparation of a method statement is without prejudice to any party's right of appeal.
42. Once the final method statement is approved by the court, it will consider submissions on the issue of legal costs.